

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
June 8, 2004 Session

**CONSOLIDATED PIPE & SUPPLY COMPANY, INC. v. DEER PATH  
VACATIONS, L.P., ET AL.**

**Appeal from the Chancery Court for Sevier County  
No. 02-12-562      Telford E. Forgety, Jr., Chancellor**

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**No. E2003-02787-COA-R3-CV - FILED SEPTEMBER 27, 2004**

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Consolidated Pipe & Supply Company, Inc. (“the Lienor”) contracted with Stetson & Associates of Tennessee, Inc. (“the Debtor”) to furnish pipe in connection with the Debtor’s construction activities on a subdivision being developed by Deer Path Vacations, Inc. (“the Owner”). The Debtor failed to pay for the pipe furnished by the Lienor. Subsequently, the Debtor and the Owner filed separate petitions in bankruptcy court seeking relief under the Bankruptcy Code (“the Code”). The Lienor served notice of its lien claim on the Owner. Thereafter, the Lienor filed suit on its lien claim against the Owner and First Tennessee Bank National Association and J. Michael Winchester, Trustee (collectively “the Bank”). The Bank moved to dismiss the Lienor’s suit on the basis that the suit was not timely filed. The trial court dismissed the Lienor’s complaint, finding that the Lienor “fail[ed] to timely enforce [its] lien.” The Lienor appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and WILLIAM H. INMAN, SR.J., joined.

John A. Walker, Jr., Knoxville, Tennessee, for the appellant, Consolidated Pipe & Supply Company, Inc.

John C. Speer, Timothy F. Zitzman, and Erica Taylor Greene, Memphis, Tennessee, for the appellees, First Tennessee Bank National Association and J. Michael Winchester, Trustee.

**OPINION**

## I.

On September 6, 2002, the Lienor served its notice of lien on the Owner pursuant to Tenn. Code Ann. § 66-11-115 (1993).<sup>1</sup> Three days later, on September 9, 2002, the Lienor filed its notice of lien in the Register of Deeds' Office. On December 9, 2002, the Lienor filed a complaint on its lien in the trial court. As can be seen, suit was filed 94 days after service of the notice of lien on the Owner.

After the notice of lien was served on the Owner and was later filed for recordation, but before the Lienor filed its complaint, the Owner and the Debtor, on October 17, 2002, filed their petitions in bankruptcy, triggering the automatic stay provisions of the Code. *See* 11 U.S.C. § 362. The two petitions were administratively consolidated on November 15, 2002. The Lienor filed a motion in the bankruptcy court on January 8, 2003, asking the court to modify the stay so that it might "proceed with its suit to prove its account and to prove and perfect its lien claim against [the Owner]." On February 6, 2003, the Lienor sought a writ of attachment in the trial court. The bankruptcy court granted the Lienor's motion for relief on February 12, 2003, decreeing that the Lienor was entitled to relief from the automatic stay "to the extent necessary to take the action or actions required by Tennessee statute to continue the perfection process for a materialmen's lien in Sevier County Chancery Court."

On June 12, 2003, the Bank filed a motion in the trial court, seeking to dismiss the Lienor's complaint. The Bank contends that the Lienor is not entitled to a lien on the Owner's property because, so the argument goes, the Lienor failed to file its complaint within the 90-day period

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<sup>1</sup>Tenn. Code Ann. § 66-11-115 provides:

(a) Every journeyman or other person contracted with or employed to work on the buildings, fixtures, machinery, or improvements, or to furnish materials for the same, whether such journeyman, furnisher, or other person was employed or contracted with by the person who originally contracted with the owner of the premises, or by an immediate or remote subcontractor acting under contract with the original contractor, or any subcontractor, shall have this lien for such work or material; provided, that the subcontractor, laborer or materialman satisfies all of the requirements set forth in § 66-11-145, if applicable.

(b) Within ninety (90) days after the demolition and/or building or improvement is completed, or the contract of such laborer, mechanic, furnisher, or other person shall expire, or such person is discharged, such person shall notify, in writing, the owner of the property on which the building is being erected or the improvement is being made, or the owner's agent or attorney, if the owner resides out of the county, that the lien is claimed.

(c) The lien shall continue for the period of ninety (90) days from the date of the notice in favor of such subcontractor, journeyman, furnisher, mechanic or laborer, and until the final termination of any suit for enforcement brought within that period.

described in Tenn. Code Ann. § 66-11-115(c). The Lienor argues that the automatic stay provisions of the Code precluded it from complying with the 90-day period. The trial court entered an order of dismissal on November 5, 2003, finding that the Lienor “fail[ed] to timely enforce [its] lien.” The Lienor appeals.

## II.

The singular issue in this case is whether the Lienor timely filed its complaint on its lien in the trial court. This issue presents a question of law. Accordingly, our review is undertaken “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower court[.]” *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

## III.

Tenn. Code Ann. § 66-11-115(c) provides that the lien granted in subsection (a) of the statute “shall continue for the period of ninety (90) days from the date of the notice in favor of such . . . furnisher . . . and until the final termination of any suit for enforcement brought within that period.” The Lienor filed its complaint 94 days from and after service of the notice of lien on the Owner. The Lienor seems to suggest, with no citation of authority, that the 90-day period starts to run, not from the service of the notice of lien on the Owner, but rather from the filing for recordation of the sworn statement pursuant to Tenn. Code Ann. § 66-11-117 (1993).<sup>2</sup> We disagree with this “suggestion.” The applicable 90-day period is stated as being “from the date of the *notice*.” See Tenn. Code Ann. § 66-11-115(c) (emphasis added). That provision comes immediately after the provision dealing with the obligation of the furnisher to “notify, in writing, the owner of the property.” See Tenn. Code Ann. § 66-11-115(b). Subsection (c) of the statute must be read *in para materia* with the statute’s subsection that immediately precedes it. The inescapable conclusion is that the 90-day

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<sup>2</sup>Tenn. Code Ann. § 66-11-117 provides as follows:

A mechanic's lien shall have precedence over all other subsequent liens or conveyances during such time; provided, that a sworn statement of the amount due and/or approximating that to accrue for such work, labor, or materials, and a reasonably certain description of the premises, shall be filed, within the ninety-day period referred to in § 66-11-115(b), or in the case of liens acquired by contract executed on or after April 17, 1972, by virtue of § 66-11-141, within ninety (90) days after completion of the structure which is or is intended to be furnished water by virtue of drilling a well, or abandonment of work on the structure, as the case may be, with the county register, who shall note the same for registration, and put it on record in the lien book in the office of the register, for which the register shall be entitled to the sums specified in § 8-21-1001, which sums shall be paid by the party filing the same; but such fees shall be receipted for on the statement of account, and shall be part of the indebtedness or charge secured by the lien, and this registration shall be notice to all persons of the existence of such lien.

period runs from the date of service of the notice on the owner of the property and not from the date of filing alluded to in Tenn. Code Ann. § 66-11-117. Accordingly, we reject the Lienor's position that suit filed 94 days after service of the notice of lien on the Owner satisfies the provisions of Tenn. Code Ann. § 66-11-115(c). As "enforcement of a mechanic's and materialman's lien is a statutory right and strict compliance with [Tenn. Code Ann. § 66-11-115] is required," failure to institute a suit within the statutory 90-day period renders the lien void. *Eatherly Constr. Co. v. DeBoer Constr., Inc.*, 543 S.W.2d 333, 334-35 (Tenn. 1976).

#### IV.

Despite the untimely filing of its suit, the Lienor seeks to salvage its claim by finding solace and relief in the petition in bankruptcy filed by the Owner. Specifically, the Lienor claims that the Code, particularly its automatic stay provisions, authorizes it to continue the pursuit of its lien rights. The Lienor contends that the Owner's bankruptcy petition triggered the automatic stay provisions of the Code set forth in 11 U.S.C. § 362(a).<sup>3</sup> Consequently, according to the Lienor, the 90-day time period was tolled pursuant to the pertinent provisions of 11 U.S.C. § 108.<sup>4</sup>

The Bank proffers several arguments to counter the Lienor's attempt to use the Code to validate its lien. First, the Bank contends that the filing of a complaint on a lien is part of the perfection process and not an enforcement action. Consequently, so the argument goes, the automatic stay provisions of the Code do not apply to the Lienor's complaint as it was excepted from

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<sup>3</sup> 11 U.S.C. § 362(a) provides, in relevant part, as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

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4) any act to create, perfect, or enforce any lien against property of the estate; . . .

<sup>4</sup> 11 U.S.C. § 108 provides, in pertinent part, as follows:

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

the stay as an “act . . . to maintain or continue the perfection of, an interest in property” pursuant to 11 U.S.C. § 362(b)(3).<sup>5</sup> In the alternative, the Bank maintains (1) that if the filing of the complaint be viewed as a violation of the automatic stay, the lien is void because, according to the Bank, an action taken in violation of the stay is void; (2) that the Lienor failed to furnish notice to the bankruptcy court as required by 11 U.S.C. § 546(b);<sup>6</sup> and (3) that the Lienor failed to re-file its state court claim within 30 days of the order of the bankruptcy court granting it relief from the stay, as required by 11 U.S.C. § 108(c).

To buttress its claim that the 90-day time period was tolled under the Code, the Lienor cites the automatic stay provision contained in 11 U.S.C. § 362(a)(4), which extends the stay to “any act

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<sup>5</sup> 11 U.S.C. § 362(b) provides, in relevant part, as follows:

b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

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(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title; . . .

<sup>6</sup> 11 U.S.C. § 546(b) provides as follows:

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that–

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If–

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

to create, perfect, or enforce any lien against property of the estate.” The Lienor characterizes the complaint as an enforcement action stayed under § 362(a)(4), which subsequently triggers the time extension provisions of the Code under 11 U.S.C. § 108(c). The Lienor contends that, once the Owner filed its bankruptcy petition, the Lienor could not have enforced its lien without violating the automatic stay. In support of this contention, the Lienor relies upon the distinction between perfecting a lien and enforcing a lien, arguing that the notice of lien served on an owner acts to perfect the lien, while the filing of the complaint and the securing of a writ of attachment constitute enforcement of the lien, which, by the language of 11 U.S.C. § 362(a)(4), is stayed by the Code.

## V.

As can be seen, a good portion of the parties’ argument revolves around the “perfection” versus “enforcement” dichotomy. While this is an important issue, we do not believe it is one that is implicated by the facts of this case. If, as the Lienor argues, the filing of suit on a lien in Tennessee is an enforcement action and thus subject to the bar of the automatic stay, the lifting of the stay would only be legally significant with respect to a suit filed *after* the stay was lifted. *No such new suit was filed in the case at bar*. We are unaware of any authority supporting the Lienor’s argument that the lifting of the stay can “breathe” new life into a lawsuit filed in violation of the stay and *before* it was lifted. It is clear that a lien lawsuit filed in contravention of the automatic stay is void under the Code. ***Easley v. Pettibone Michigan Corp.***, 990 F.2d 905, 911 (6th Cir. 1993). Those cases which use the Code to extend the time for filing suit where no suit was filed *before* the stay was lifted<sup>7</sup> are of no precedential value where, as here, no suit was filed *after* the stay was lifted.

If, on the other hand, the Lienor’s suit is a part of the perfection process and thus excepted from the automatic stay – as argued by the Bank – we are left with a suit that was not timely filed and a lien that is void under state law. *See Eatherly*, 543 S.W.2d at 334-35.

In either event – be the suit one for perfection of a lien or one for enforcement – the lien is void under state law. The bankruptcy filing and the provisions of the Code do not change this.

## VI.

In view of our holding in the preceding section of this opinion, we do not find it necessary to address the remaining arguments proffered by the parties, namely whether this action falls within the rubric of an enforcement action stayed under the Code or an action to continue or maintain the perfection of an interest, which is excepted from the automatic stay provisions. For the same reason, we decline to discuss the notice requirement under 11 U.S.C. § 546.

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<sup>7</sup> *See, e.g., In re 360 Networks (USA) Inc.*, 282 B.R. 756, 763 (Bankr. S.D.N.Y. 2001); *In re Concrete Structures, Inc.*, 261 B.R. 627, 645-46 (Bankr. E.D. Va. 2001).

VII.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Consolidated Pipe & Supply Co., Inc. The case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE

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